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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

11 LAURA ZAMORA JORDAN, as her) NO. 2:14-CV-00175-TOR
12 separate estate, and on behalf of others)
13 similarly situated,) PLAINTIFF'S MOTION FOR PARTIAL
14 Plaintiffs,) SUMMARY JUDGMENT
15 vs.)
16) CLASS ACTION
17 NATIONSTAR MORTGAGE, LLC, a) Note on Motion Calendar:
18 Delaware Limited liability company,) September 2, 2015
19 Defendant.) Without Oral Argument¹:
)

20
21 ¹ At the direction of the Court, Plaintiff has filed this motion without oral argument for
22 this motion and Defendant's pending Motion for Partial Summary Judgment currently
23 scheduled for July 30, 2015, at 1:30 p.m. Notwithstanding the filing of Plaintiff's
24 motion without oral argument, Plaintiff does request oral argument on her motion.
25
26

PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT

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I. UNDISPUTED FACTS

Nationstar forcibly enters borrowers' homes in Washington State when the borrower is in default and Nationstar determines that the home is vacant. *See* ECF No. 3-8 at ¶¶3-22. Upon entry, Nationstar removes the borrowers' locks and installs its own locks and lock box upon the borrowers' homes. *See* ECF No. 3-8 at ¶¶3-22. Nationstar conducts these forcible entries and lock changes without any attempt to gain the borrowers' post-default consent and without supervision of the court. *See* ECF No. 3-8 at ¶¶3-22. Rather, Nationstar relies solely upon a provision embedded in the form deed of trust securing the borrowers' homes, which reads in relevant part as follows:

If (a) Borrower fails to perform the covenants and agreements in this Security Instrument . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off.

("Entry Provision"). ECF No. 45 at 19.

1 Plaintiff Laura Zamora-Jordan challenges the actions of Nationstar in reliance
2 on the Entry Provision and Nationstar defends its actions.
3

4 II. INTRODUCTION

5 Nationstar's previously filed summary judgment motion relative to the Entry
6 Provision misunderstands Jordan's specific challenge to Nationstar's actions. Jordan
7 does not contend that the Entry Provision is unenforceable in its entirety and can never
8 be acted upon. Rather, Jordan contends that the self-help portion of the Entry
9 Provision can be acted upon *so long as* Nationstar obtains either the post-default
10 consent of the borrower or the permission of a court.
11

12 The self-help portion of the Entry Provision reads as follows:
13

14 ...entering the Property to make repairs, change locks,
15 replace or board up doors and windows, drain water
16 from pipes, eliminate building or other code violations
17 or dangerous conditions, and have utilities turned on or
18 off.
19

20 (“Self-Help”) ECF No. 45 at 19.

21 Jordan contends that the Entry Provision relied upon by Nationstar is valid and
22 enforceable *to the extent* that Nationstar complies with Washington law when
23 effectuating the Self-Help portion of the Entry Provision. Prior to engaging in the
24
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1 Self-Help, Washington law requires a lender to either 1) get the borrower's post-
2 default consent or 2) obtain permission of the court to conduct the Self-Help through a
3 receiver. Accordingly, when Nationstar conducts the Self-Help contained in the Entry
4 Provision without either the borrower's post-default consent or permission of the court,
5 Nationstar violates Washington law.
6
7

8 **III. RELIEF SOUGHT**

9

10 Ms. Jordan requests an order determining that Washington law requires
11 Nationstar to obtain the borrower's post-default consent or permission from a court in
12 order to conduct Self-Help activities upon a borrower's home prior to completion of a
13 foreclosure.
14

15 **IV. ARGUMENT**

16

17 **A. The Borrower's Post-Default Consent is Required to Engage in** 18 **Self-Help**

19 In order for Nationstar to lawfully act upon the Self-Help portion of the Entry
20 Provision in Washington State it must either obtain the post-default consent of the
21 borrower or obtain permission from a court. In so doing, Nationstar will not only
22 render moot the claims it faces surrounding pre-foreclosure possession of borrowers'
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1 properties, Nationstar will also render the Entry Provision it relies upon entirely
2 enforceable, will comport with the requirements of Freddie and Fannie Mac, and will
3 meet the public policy concerns it so strenuously argues for.
4

5
6 1. Possession is Unlawful Without the Borrower's Post-Default
7 Consent

8 Nationstar goes to great lengths to color its actions as something other than
9 possession. Nationstar's arguments fail as a matter of Washington law and fail as a
10 matter of common sense.
11

12 Indeed, the undisputed facts satisfy **Nationstar's own definition of possession:**
13 "for purposes of this case, 'possession' requires physical control of property to the
14 exclusion of others...." ECF No. 60 at 4. Physical control is met when Nationstar
15 maintains its locks on a borrower's home – *even when* the borrower demands removal
16 of the locks.² Exclusion of others is met both by the locks themselves and the signs
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23 ² See Decl. of Gatens in Support of Plaintiff's Motion for Partial Summary Judgment
24 (Decl. Gatens) at ¶2, Exhibit 1.
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1 that Nationstar posts on the property directing that it be contacted for entry and no
2 “unauthorized” persons will be granted access.³
3

4 Notwithstanding the above, the issue of possession – whether it be a plain
5 language interpretation of the Entry Provision language itself or an interpretation of
6 Nationstar’s actions in reliance upon the Entry Provision language – is mooted if
7 Nationstar simply obtains the borrower’s post-default consent prior to entering the
8 borrower’s home and performing Self-Help. Said another way, it is the gaining of the
9 borrower’s post-default consent that gives lawful effect to the Entry Provision and
10 Nationstar’s Self-Help actions.
11
12
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14 The borrower’s consent to Self-Help cannot be given prior to default because it
15 is well established in Washington that a borrower cannot give a right of possession to a
16 lender *prior to* a default. *See* RCW 7.28.230; Restatement (Second) of Property:
17 Mortgages, § 4.1(b) (1997) (“Any agreement, whether in a mortgage or not, that grants
18 the mortgagee, as mortgagee, the right to possession in the future is
19 unenforceable....”). No such prohibition, however, abides *after* a default has occurred
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24 ³ *Id.* at Exhibit 2.
25
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1 as evidenced by the common practice of a borrower granting a lender a deed-in-lieu of
2 foreclosure after default.⁴ Accordingly, independent of whether the Entry Provision's
3 language or Nationstar's actions constitute possession (they do), the Entry Provision is
4 nonetheless enforceable *so long as* Nationstar obtains the borrowers' post-default
5 consent to the Self-Help taken by Nationstar under the Entry Provision.
6

7
8 Requiring the borrower's post-default consent is also consistent with the overall
9 interpretation of the national form deed of trust that Nationstar relies upon because the
10 form deed of trust expressly requires compliance with applicable state law:
11

12
13 This Security Instrument shall be governed by federal law and
14 the law of the jurisdiction in which the Property is located. All
15 rights and obligations contained in this Security Instrument are
16 subject to any requirements and limitations of Applicable Law.

17 ECF No. 3-5 at Exhibit 19 ¶ 16.

18
19 ⁴ See e.g., *Black's Law Dictionary*, Deed (10th ed. 2014) (defining "deed in lieu of
20 foreclosure" as "[a] deed by which a borrower conveys fee-simple title to a lender in
21 satisfaction of a mortgage debt and as a substitute for foreclosure."); 18 Wash. Prac.,
22 Real Estate, § 18.30 (2d ed. 2015) ("The deed in lieu of foreclosure is a common
23 transaction....")
24
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1
2 As such, the above-referenced “requirement” relative to the Entry Provision is
3 that Nationstar act in accordance with Washington law and the “limitation” is that Self-
4 Help not be acted upon absent the borrower’s post-default consent.
5

6 Relatedly, in the context of a form deed of trust’s compliance with Washington
7 law, the form deed of trust provided by the Washington State Bar Association for use
8 by Limited Practice Officers does *not* contain any form of entry provision upon a
9 default.⁵
10
11

12 Lastly, Nationstar’s argument (ECF No. 60 at 4-6) that the “reasonable or
13 appropriate” verbiage found in the Entry Provision saves the provision fails because
14 Washington forbids a lender from possessing a borrower’s property prior to default
15 *even when* the borrower has abandoned the property. *Howard v. Edgren*, 62 Wn.2d
16 884, 885, 385 P.2d 41 (1963). As such, it does not matter if it is “reasonable or
17 appropriate” to take possession of the borrower’s property under the Entry Provision –
18 the lender simply cannot do it absent the borrower’s post-default consent (or
19 permission of the court, as discussed below).
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24 _____
25 ⁵ See Decl. Gatens at ¶4, Exhibit 3.
26

1 2. Even if the Entry Provision Grants Entry and not Possession,
2 the Borrower's Post-Default Consent is Still Required

3 Even if the Court accepts the argument that the Entry Provision permits entry
4 and not possession, Nationstar must still get the borrower's post-default consent for
5 entry because the "limited license" that Nationstar contends grants it permission to
6 enter the borrower's property and perform the Self-Help is not assignable to
7 Nationstar.
8

9 If the Entry Provision truly is only a limited right of entry to conduct the Self-
10 Help, then it is by definition a license because it allows for entry onto the property of
11 another for one or more specific purposes. *See Showalter v. City of Cheney*, 118 Wn.
12 App. 543, 548, 76 P.3d 782 (2003) ("A license authorizes the doing of some act or
13 series of acts on the land of another....").
14

15 In Washington, however, a license to enter the property of another "is revocable
16 and **nonassignable**." *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298
17 P.2d 849 (1956) (emphasis added); 7A Am. Jur. Legal Forms § 94:56 (2d ed. 2015)
18 ("[A] license in real property is a personal, revocable, and nonassignable privilege to
19 20 21 22 23 24 25 26

1 do one or more acts on real property without possessing any interest in such
2 property.”).

3
4 This well-established precedent is fatal to Nationstar’s argument that the Entry
5 Provision grants Nationstar a right of entry via a so-called “limited license.” To the
6 extent any license was given by the class members, this license was given only to the
7 original lender, and not to Nationstar or its agents.
8

9
10 Rather than concede that licenses are not assignable, however, Nationstar
11 represents to this Court that, “while a ‘bare’ license is revocable *and* non-assignable, a
12 license coupled with an interest is not.” ECF No. 60 at 7 (emphasis added). Nationstar
13 cites to five cases from other jurisdictions in support of this assertion. ECF No. 60 at 7.
14 However, not a single one of those cases held that a license coupled with an interest
15 renders a license *assignable*. Those cases held that the license was merely non-
16 revocable.
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19
20 Under Washington law, Nationstar’s “limited license” theory of the Entry
21 Provision fails. The borrower alone has the authority to assign a license. Because
22 Nationstar is merely a loan servicer and not the original lender, none of the over 3,600
23 class members have ever granted or assigned a license for Self-Help to Nationstar.
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1 Nationstar could remedy this problem by simply obtaining a license in its favor
2 as part of its post-default servicing procedures. However, it fails to do so and conducts
3 non-consensual property “entries” that neither Nationstar nor its agents have a legal
4 right to conduct.
5

6
7 **B. Absent Consent, Court Permission is Required to Enforce the**
8 **Self-Help Portion of the Entry Provision**

9 Nationstar will likely assert that when a borrower is in default it is unable to
10 locate or communicate with the borrower to obtain post-default consent. This is untrue
11 because Nationstar is routinely in communication with borrowers post-default but prior
12 to conducting a lock change.⁶
13

14
15 However, even if Nationstar is unable to get the borrower’s post-default consent,
16 there is a “comprehensive, streamlined, and cost-effective procedure” created by the
17 Washington Legislature specifically for the purpose of allowing a lender to protect its
18 interests in real property during a foreclosure absent consent of the borrower. This
19 procedure is codified by RCW ch. 7.60 and is the exclusive remedy available to
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24 ⁶ Decl. Gatens at ¶5, Exhibits 4–27.
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1 Nationstar when it wants to engage in Self-Help without the borrower's post-default
2 consent.
3

4 1. RCW ch. 7.60 Is the Exclusive Remedy for Gaining Possession,
5 Dominion, or Control over a Non-Consenting Borrower's
6 Property During Foreclosure

7 In Washington, "[i]f a remedy provided by statute is exclusive, the statute
8 implicitly abrogates all common law remedies within the scope of the statute." *Tacoma*
9 *Auto Mall, Inc., v. Nissan North America, Inc.*, 169 Wn. App. 111, 125, 297 P.3d 487
10 (2012). To determine whether a statutory remedy is exclusive, the court must first
11 examine the language and provisions of the statute in question. *Id.* A statute may
12 include an exclusivity provision. However, **the absence of such an exclusivity**
13 **provision does not defeat the case for preemption.** *See Id.* "If the language of the
14 statute is inconclusive, the court may look to other manifestations of legislative intent,"
15 such as "the comprehensiveness of the remedy provided by the statute, the purpose of
16 the statute, and the origin of the statutory right." *Potter v. Wash. State Patrol*, 165
17 Wn.2d 67, 79–80, 84, 196 P.3d 691 (2008).
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23 Here, RCW ch. 7.60 does not contain an "exclusivity provision." However,
24 "other manifestations of legislative intent" including the "comprehensiveness of the
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1 remedy provided by the statute, the purpose of the statute, and the origin of the
2 statutory right” demonstrate that the Legislature intended Chapter 7.60 to be the
3 exclusive remedy for beneficiaries seeking to “take charge” of a property that is
4 subject to an nonjudicial foreclosure proceeding. RCW 7.60.015; *see also* RCW
5 7.60.025.
6

7
8 *a. Comprehensiveness of the remedy provided by Chapter 7.60*
9

10 That RCW ch. 7.60 does not provide a comprehensive remedy cannot be
11 reasonably argued. In enacting the statute, the legislature set forth an exhaustive list of
12 forty scenarios in which a receiver should be appointed. RCW 7.60.025(1)(a)-(mm).
13 This list is so comprehensive that it explains when receivers may be appointed in an
14 action by the department of licensing “with respect to persons engaged in the business
15 of dispensing of hearing aids.” *Id.* at (1)(m). The legislature would not have set forth
16 such specific, comprehensive provisions governing receiverships without intending
17 those provisions to represent the exclusive avenue for exercising receiver powers; nor
18 could the legislature have intended to empower the court with such specificity while
19 still intending private parties to exercise receiver powers without supervision. RCW
20 ch. 7.60 provides a comprehensive remedy.
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1 ***b. The purpose of Chapter 7.60***

2
3 The purpose of RCW ch. 7.60 is expressly stated:

4 The purpose of this act is to create more comprehensive,
5 streamlined, and cost-effective procedures applicable to
6 proceedings in which property of a person is administered by
7 the courts of this state **for the benefit of creditors** and other
 persons having an interest therein.

8 Receiverships, ch. 165, sec. 1, 2004 Wash. Sess. Laws 591, 591 (emphasis added).

9
10 To further that expressly-stated purpose, the Legislature granted courts “the
11 **exclusive** jurisdiction to determine **all controversies** relating to the collection,
12 **preservation**, application, and distribution **of all the property**” to which a receiver
13 may statutorily control. RCW 7.60.055. Nationstar’s claim of a right to unilaterally
14 determine and control property “preservation” activities directly contradicts the
15 Legislature’s intent that the court have the “exclusive jurisdiction” relating to
16 “preservation” of the property.
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20 Further, it was the Legislature’s intent in virtually rewriting RCW ch. 7.60 in its
21 entirety in 2004 to abrogate all receivership law not consistent with the 2004
22 reinvention: “Other provisions regarding receivers and receiverships are included, and
23 duplicative, inconsistent and archaic statutes are repealed.” B. An. S.B. 6189, 58th
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26

1 Leg. 2d Reg. Sess. (Wash. March 2, 2004). The statute’s purpose demonstrates the
2 legislature’s intent to provide an exclusive remedy in enacting RCW ch. 7.60.
3

4 c. The origin of the statutory right

5 The legislature provides a history of RCW ch. 7.60:

6
7 [Prior to 2004, RCW ch. 7.60 consisted] of five relatively
8 short sections, most of which were originally enacted over
9 150 years ago. Over time, there have been numerous statutes
10 enacted throughout the code that authorize the appointment
11 of a receiver under various circumstances. In addition, courts
12 have developed some case law addressing some issues of
13 receiverships that are not explicitly addressed in the statutes.

14 *Id.*

15 The 2004 version of RCW ch. 7.60 was “not intended to be a radical change
16 from how receiverships [were] operating under [pre-2004] law”; but rather “a
17 codification of case law.” H.R. Rep. S.B. 6189, 58th Leg., 2d Reg. Sess. (Wash.
18 March 5, 2004). Thus the origin of the statutory right demonstrates the legislature’s
19 intent to codify prior common receivership law into a modern, streamlined,
20 comprehensive and exclusive statute.
21
22

23 Since “time immemorial,” Washington courts have had exclusive jurisdiction
24 and authority over the appointment of receivers. *State v. Superior Court for King*
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1 *County*, 161 Wn. 550, 554, 297 P. 774 (1931). Here, the Self-Help provisions which
2
3 purportedly permit Nationstar and its agents to “take charge” of plaintiffs’ homes
4 grants Nationstar those powers exclusively enjoyed by a custodial receiver. RCW
5 7.60.015 (appointed to “take charge” of “specific property”).
6

7 Moreover, the Self-Help provisions bestow on Nationstar custodial receiver
8 powers in direct contravention of Washington’s receivership statute. RCW 7.60.035(2)
9 (“a person **may not** be appointed as a receiver if ... the person ... [i]s a party to the
10 action, ... secured or unsecured creditor, ... of holder of an equity interest in ... the
11 property ... or ... [h]as an interest materially adverse to the interest of persons to be
12 affected by the receivership generally”) (emphasis added). The legislature did not
13 intend to permit private litigants to wield such statutorily defined power without court
14 approval and in violation of Washington law.
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19 As the text, purpose, and comprehensive nature of RCW ch. 7.60 indicates, the
20 legislature intended statutory receivership to be the exclusive method of exercising
21 receiver powers. Allowing private parties to use contracts to create their own
22 procedures would allow for infinite procedures pertaining to receiver powers,
23 controverting the statutory intent. Accordingly, the Self-Help provisions in the Deed of
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1 Trust are enforceable only to the extent that they require the appointment of a receiver
2 pursuant to RCW ch. 7.60—the exclusive remedy for lenders and servicers desiring to
3 “take charge” of property subject to a deed of trust of which they are a beneficiary.
4

5 **C. Public Policy Supports Compliance with Washington Law When**
6 **Conducting Self-Help**
7

8 Public policy is best served when lenders are prevented from engaging in Self-
9 Help absent the post-default consent of the borrower or supervision of the court. This
10 is true because the borrower, the public, *and* the lender all gain important protections
11 when these conditions are met and enforced.
12

13 1. Consent of the Borrower or Appointment of a Receiver is Practical,
14 Streamlined, and Cost-Effective
15

16 Nationstar laments that appointing a receiver is not practical. ECF No. 60 at
17 8:10. As an initial matter, this argument fails because it does not even address the
18 most practical approach available to Nationstar: a call or letter to the borrower asking
19 for their consent. If a borrower truly has abandoned their home and has no further
20 interest in it there is little reason to think the borrower would not grant consent to
21 Nationstar to conduct its Self-Help. Making this minimal effort is the most expedient
22 and cost-effective option available – Nationstar just elects not to pursue it.
23
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1 Absent the borrower's consent, RCW ch. 7.60 is available to Nationstar.
2
3 Tellingly, Nationstar's primary complaint against RCW ch. 7.60 is that it would
4 require "lenders to resort to such an expensive, time-consuming, and uncertain
5 remedy...." ECF No. 60 at 10:2. No authority, however, is cited in support of this
6 claim. Moreover, this self-serving claim directly contradicts the Washington
7 Legislature's express purpose in enacting RCW ch. 7.60 to provide a "comprehensive,
8 streamlined, and cost-effective procedure" for a lender concerned with the security of
9 its collateral during a foreclosure. Receiverships, ch. 165, sec. 1, 2004 Wash. Sess.
10 Laws 591, 591 ("The purpose of this act is to create more comprehensive, streamlined,
11 and cost-effective procedures applicable to proceedings in which property of a person
12 is administered by the courts of this state for the benefit of creditors and other persons
13 having an interest therein.").

14 The importance of utilizing the appointment of a receiver cannot be understated
15 because the receivership process affords necessary protections to *all* parties affected by
16 the foreclosure: the borrower, the public, and the lender.
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1 a. *The Borrower's Interest*

2 The borrower's interest is protected because borrowers are provided with notice
3
4 and an opportunity to object to Self-Help occurring on their property. This is critical
5 to protect against the very abuses that are present in this case, as well as nationally,
6
7 involving lenders, loan servicers, and property preservation companies. For example,
8
9 a 2014 Audit Report from the Federal Housing Agency Office of Inspector General on
10 Pre-Foreclosure Property Inspections concluded that lenders and loan servicers "do not
11 have quality controls in place to obtain reasonable assurance that pre-foreclosure
12 property inspection information is accurate, consistent, and complete." Fed. Hous. Fin.
13 Agency, Office of Inspector Gen., *FHFA Oversight of Enterprise Controls Over Pre-*
14 *Foreclosure Property Inspections*, AUD-2014-012 (2014).
15
16

17 b. *The Public's Interest*

18 The public's interest is protected because consent or judicial supervision will
19
20 prevent harm to communities whose members are already struggling financially, only
21 to have their homes broken into, in some cases their personal property stolen, and in all
22
23 cases their lives dramatically disrupted.
24
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1 The public's interest in preventing these abuses is illustrated by the recent suit
2 filed by the Illinois Attorney General against a national pre-foreclosure property
3 inspection company alleging that the company unlawfully removed legal occupants
4 from their homes by breaking into an occupied house, locking the occupants out of
5 their homes, removing their personal property, and shutting off utilities in the home.
6
7 *Complaint, Illinois v. Safeguard Properties, LLC*, No. 2013CH20715 (Ill. Cir. Ct. Sep.
8 3, 2013). These are the same abuses that are present here.
9

10
11 c. *The Lender's Interest*
12

13 Lenders, like Nationstar, also have a vested interest in acting upon the Entry
14 Provision and engaging in Self-Help only in compliance with state laws because doing
15 so will insulate them from claims from borrowers. Simply gaining the consent of the
16 borrower or utilizing the receivership statute is undoubtedly less expensive, less time-
17 consuming, and less uncertain than facing litigation on behalf of the thousands of
18 borrowers that have been – and continue to be – subjected to Self-Help by Nationstar.
19
20
21

22 **V. CONCLUSION**

23 For the reasons stated above and in Jordan's Response to Nationstar's Motion
24 for Partial Summary Judgment, the Court should grant this motion and hold that -
25
26

1 absent a borrower's post-default consent or permission of the court - Nationstar's Self-
2
3 Help actions under the Entry Provision violate Washington law.

4 RESPECTFULLY SUBMITTED AND DATED this 14th day of July, 2015.

5
6 TERRELL MARSHALL DAUDT
7 & WILLIE PLLC
8

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CERTIFICATE OF SERVICE

I, Michael D. Daudt, hereby certify that on July 14, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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1 DATED this 14th day of July, 2015.

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